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No. 09-1032

In The
Supreme Court of the United States

TELECHECK SERVICES, INC.,
TELECHECK INTERNATIONAL, INC.
and FIRST DATA CORPORATION,

Petitioners,

v.

CHERYL BEAUDRY, individually and
on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation (*hereinafter*, collectively, "TeleCheck").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. All parties have consented to the filing of CDIA's *amicus* brief. The consent letters have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments.

CDIA is vitally interested in the outcome of this case because the court of appeals' decision reverses established law in the Sixth Circuit, conflicts with the decisions of another federal court of appeals, and deprives CRAs of an essential defense, relied upon hundreds of times each year, to obtain summary judgment for claims alleged by *uninjured* plaintiffs. Without the ability to obtain pre-trial dispositive rulings, CDIA's member CRAs may be compelled to settle hundreds of such claims each year, particularly in the class action context, rather than risk trials if plaintiffs are no longer required to prove that they were injured by the CRAs' alleged willful failure to: (i) follow reasonable procedures when preparing consumer reports to assure the maximum possible accuracy of consumer report information; or (ii) conduct a reasonable reinvestigation to determine the accuracy of consumer report information that is disputed by the consumer.

Because CDIA has been involved in the consumer reporting industry for more than a century, its experience can provide the Court with a unique perspective on the consequences of the court of appeals' decision.

SUMMARY OF ARGUMENT

Under the FCRA, the reasonableness of any procedures that a plaintiff alleges should have been adopted by a CRA to assure the maximum possible accuracy of a consumer report is measured against the burden such procedures would impose upon the CRA. A CRA acts unreasonably in not adopting the procedures only if the potential consumer injury outweighs the burden on the CRA of adopting procedures that would have prevented the injury. In this way, the FCRA balances the needs of commerce and the needs of the consumer. If not corrected, the court of appeals' decision upsets this carefully crafted Congressional balance.

Under the court of appeals' decision, actual consumer injury no longer needs to be considered when evaluating the reasonableness of a CRA's accuracy or reinvestigation procedures. Instead the plaintiff need only allege that a CRA followed unreasonable procedures to produce a consumer report about the plaintiff without any allegation that the report caused an actual injury to the plaintiff.

The court of appeals' decision reverses its own recent precedent, conflicts with the decisions of the Seventh Circuit Court of Appeals, and fails to provide any standard against which CRAs, courts, or juries, can measure the reasonableness of a CRA's procedures to assure the maximum possible accuracy of the reports it furnishes or the reasonableness of its

reinvestigation procedures when responding to a consumer's accuracy dispute.

The court's decision may deprive CRAs of an essential defense to consumer claims that CRAs rely upon hundreds of times each year to obtain dispositive rulings against plaintiffs who either fail to allege injury, or fail to produce evidence of injury during summary judgment proceedings. Without this defense, CRAs may be compelled to settle hundreds of such claims each year, particularly if pled as class actions, rather than risk trials if plaintiffs are no longer required to prove that they were injured by the CRAs' alleged willful failure to follow reasonable accuracy or reinvestigation procedures.

This Court should grant TeleCheck's petition for writ of *certiorari* to restore Congress' carefully crafted balancing of consumer and CRA interests that have been disrupted by the court of appeals' decision.

ARGUMENT

CDIA agrees with TeleCheck that the court of appeals' decision directly conflicts with the decisions of the Seventh Circuit Court of Appeals as to whether injury remains an essential element of an FCRA claim alleging willful violations of 15 U.S.C. §§ 1681e(b) or 1681i(a) after the 1996 amendment permitting

consumers to recover between $100 and $1,000 for willful violations.[2]

CDIA provides its brief to explain the impact of the court of appeals' decision on the consumer reporting industry and the importance of the federal question presented by TeleCheck's petition.

I. BY REQUIRING CONSUMER INJURY FOR CLAIMS ALLEGING WILLFUL VIOLATIONS OF § 1681e(b) OR § 1681i(a), THE FCRA'S REASONABLENESS STANDARD PRESERVES THE CONSUMER-CRA BALANCE STRUCK BY CONGRESS.

When the FCRA was enacted in 1970, the U.S. Congress recognized that the efficient functioning of the consumer reporting industry was vital to the U.S. economy.[3] Consumer reports are even more important today. Billions of items of consumer data are furnished to CRAs each month by as many as 40,000

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[2] Petitioners' brief at 8-13.

[3] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW, Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

data furnishers,[4] resulting in the creation and maintenance of files on nearly 200 million consumers, containing 2.6 billion tradelines.[5] This information is used more than 1.5 billion times each year by creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[6] By making reliable data available to users, CRAs provide the information infrastructure that contributes to the soundness and efficiency of the banking, finance, retail credit, insurance, housing and law enforcement systems in the United States.

Because the value of consumer report information is directly related to its timeliness and accuracy, a perfect information standard has never been part of a CRA's obligation under the FCRA. The delay inherent in such a requirement would impair the very

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[4] *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) ("the company gathers information originated by approximately 40,000 sources").

[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9, <http://www.ftc.gov/reports/facta/041209factarpt.pdf>.

[6] *Id.*; *Sarver*, 390 F.3d at 972; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003), <http://www.ftc.gov/bcp/workshops/ infoflows/statements/cate02.pdf>.

efficiencies that the FCRA was enacted to promote.[7] Instead, to protect consumers, the FCRA has, since 1970, required CRAs to "adopt reasonable procedures for "meeting the needs of commerce" that are "fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . ."[8] The careful balancing of these sometimes different interests is reflected in the "reasonableness" standard that appears throughout the FCRA.[9] That the FCRA achieves its objectives only if the interests of consumers, CRAs, furnishers of information, and users of consumer reports are held in balance should inform any interpretation of FCRA provisions, such as 15 U.S.C. §§ 1681e(b) and 1681i(a), that include a reasonableness standard.

A. The FCRA's reasonableness standard.

When preparing consumer reports, CRAs must "follow *reasonable procedures* to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[10] A CRA that receives a consumer dispute must "conduct a

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[7] 15 U.S.C. § 1681(a)(1).

[8] 15 U.S.C. § 1681(b).

[9] *See, e.g.*, 15 U.S.C. §§ 1681(b), 1681d(d)(4)(A), 1681e(a) & (b), 1681i(a)(1)(A) & 1681i(a)(5)(C).

[10] 15 U.S.C. § 1681e(b) (emphasis added).

reasonable reinvestigation to determine whether the disputed information is inaccurate. . . ."[11]

Evaluating the "reasonableness" of a CRA's accuracy or reinvestigation procedures necessarily requires a balancing of the burdens to be imposed on the CRAs by any contemplated procedures against the harm that could result from the inaccurate consumer reports or inadequate dispute reinvestigation procedures if the procedures are not adopted.[12] "Reasonableness" for § 1681e(b) and § 1681i(a) purposes loses all meaning if a consumer need not allege, much less prove, that an injury was caused by the violation of a reasonableness standard. Under such an approach, no burden would be too great to impose on CRAs if a court, or jury, need not even consider whether the consumer's possible injury, however trivial, inconsequential, or even nonexistent, justifies the cost of the procedures to the CRAs to avoid the unspecified injury.

A reasonableness standard with no injury requirement provides no standard against which CRAs

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[11] 15 U.S.C. § 1681i(a)(1)(A) (emphasis added).

[12] *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984); *Whelan v. Trans Union Credit Reporting Agency, et al.*, 862 F.Supp. 824, 832 (E.D.N.Y. 1994); *Wiggins v. Equifax Services, Inc.*, 848 F.Supp. 213, 219 (D.C. Dist. 1993); *Houston v. TRW Information Services, Inc.*, 707 F.Supp. 689, 693 (S.D.N.Y. 1989).

may measure the reasonableness of their procedures.[13] Instead, "reasonableness" means what the court or jury says it means on a case-by-case, *post-hoc*, basis regardless of the magnitude of the burden imposed upon the CRAs. Such an outcome elevates the consumer's accuracy interests far above the needs of commerce and the efficiency of the U.S. financial system and undermines Congress' carefully crafted balancing of those interests in the FCRA.

B. The court of appeals' decision upsets Congress' carefully crafted balancing of consumer and CRA interests in the FCRA.

The district court granted TeleCheck's motion to dismiss Beaudry's complaint because she failed to allege that she was injured by TeleCheck's alleged violation of § 1681e(b). The court of appeals reversed the district court's decision, holding:

> Beaudry, to start, alleged that the defendants violated § 1681e(b) "with respect to" her just as the statute requires.
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> * * *

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[13] *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972-73 (7th Cir. 2004) ("The increased cost to Experian to examine each of these entries individually would be enormous. We find that as a matter of law there is nothing in this record to show that Experian's procedures are unreasonable.").

> Beaudry thus claims to have suffered the precise "injury" that the statute prescribes: The defendants "*prepare[d] a consumer report*" *about her* but failed to "follow reasonable procedures to assure maximum possible accuracy of the information" it contained. 15 U.S.C. § 1681e(b).[14]

The court reaches its conclusion through an analysis that improperly defines the "injury" requirement out of § 1681e(b): "*And there is an injury requirement because the statute requires the claimant to show that the defendants used unreasonable procedures in preparing a credit report about her.*"[15]

For the court, the existence of the consumer report itself is sufficient injury (*i.e.*, that the report is about the consumer). The court does not explain how the "unreasonableness" of a CRA's accuracy or reinvestigation procedures can be determined if no actual injury is required. Against what measure would the court weigh the burden to be imposed upon CRAs by the procedures a consumer-plaintiff will allege should have been followed? In departing from its own recent precedent, the court's circular reasoning – that the report itself is the injury – provides no guidance for CRAs, or for the district courts that must apply the court of appeals' new standard.

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[14] *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (emphasis added).

[15] *Id.* at 708 (emphasis added).

II. THE COURT OF APPEALS' DECISION DEPRIVES CRAS OF AN IMPORTANT DEFENSE TO CLAIMS BROUGHT UNDER § 1681e(b) AND § 1681i(a).

A. The court of appeals' 2004 decision.

In 2004, the court of appeals held that:

> In order *to assert a claim under § 1681e(b)*, a plaintiff must prove: (1) the defendant reported inaccurate information about the plaintiff; (2) the defendant *either negligently or willfully failed* to follow reasonable procedures to assure maximum possible accuracy of the information about the plaintiff; (3) the *plaintiff was injured*; and (4) the defendant's conduct was the proximate cause of the plaintiffs injury.[16]

Five years ago, the court believed that the *same* "injury" requirement applied to claims alleging *either* the *negligent or willful* violation of § 1681e(b). Five years later, the court believes its prior statement of the essential elements of a § 1681e(b) claim was "pure dictum" and "unpublished to boot."[17]

Although discounting its prior decision, the court nonetheless struggled to find some "injury" to support the reversal of the district court's decision, albeit an injury very different from the one identified in 2004.

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[16] *Nelski v. Trans Union, LLC*, 86 Fed. Appx. 840, 844 (6th Cir. 2004) (emphasis added).

[17] *Beaudry*, 579 F.3d at 707.

Under the court's 2009 analysis, a plaintiff avoids dismissal or summary judgment on a § 1681e(b) claim merely by alleging the existence of unreasonable procedures that lead to the furnishing of a consumer report about the consumer. The plaintiff is not required to allege, much less prove actual injury, or even inconvenience, caused by the report.

Although neither § 1681e(b) nor § 1681n(a) have been amended since the court of appeals' 2004 decision, the court now believes that the 1996 amendment to § 1681n(a)(1), permitting the consumer to recover $100 to $1,000, eliminated actual injury as an essential element of a § 1681e(b) claim. For the court, it is now enough if the consumer report is *about the consumer* – that is the injury. Such an approach cannot be reconciled with the language of § 1681n.

Section 1681n establishes liability for "any actual damages sustained by the consumer as a result of the failure or *damages* of not less than $100 and not more than $1,000."[18] The ordinary meaning of "damages" is: "Money claimed by, or ordered to be paid to, a person as compensation for *loss or injury*."[19] In § 1681n, the use of "damages" in the phrase "*damages* of not less than $100 and not more than $1,000" embodies Congress' intent to restrict recovery to consumers who have in some manner been "unjustly *damaged*

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[18] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[19] Black's Law Dictionary 416 (8th ed. 2004) (emphasis added).

because of inaccurate or arbitrary information in a credit report."[20]

Moreover, whereas the general statutory damages provision provides for "actual damages . . . or *damages* of not less than $100 but not more than $1000,"[21] the provisions that govern a report obtained under false pretenses – where harm can be presumed from the privacy violation – provides for "actual damages . . . or $1,000."[22] This indicates that, except where damages can be presumed, Congress used the term "damages" to restrict statutory damages to consumers who have suffered some actual injury.

Indeed, any contrary reading would be untenable: If § 1681n were interpreted not to require even a minimal level of injury, consumers could recover damages even for errors *from which they benefited* – (*e.g.*, a report inaccurately showing a defaulted debt as being paid in full). There is no evidence that Congress intended such an absurd result. Indeed, such a result would raise a serious constitutional question:

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[20] S. Rep. No. 91-517 (1969), at 1 (emphasis added); *see also, Dowell v. Wells Fargo Bank, NA.*, 517 F.3d 1024, 1026 (8th Cir. 2008) ("[a] reasonable reading of the statute [would] still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award").

[21] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[22] *Id.* § 1681n(a)(1)(B); *accord id.* § 1681n(b).

an award of statutory damages to unharmed individuals would be a penalty that bears no rational relationship to any actual harm to the plaintiff.[23]

B. The CRAs' defense to § 1681e(b) and 1681i(a) claims brought by uninjured plaintiffs.

As applied to the CRAs' obligation to prepare a consumer report following "reasonable procedures to assure maximum possible accuracy,"[24] and to "conduct a reasonable reinvestigation to determine whether . . . disputed information is inaccurate,"[25] the FCRA's reasonableness standard should allow CRAs to perform their vital function without subjecting themselves to civil liability for any alleged consumer report inaccuracy, no matter how trivial or inconsequential. The 1996 amendment adding the $100 to $1,000 alternative measure of damages for a willful violation did not alter this. The limited legislative history for the amendment makes clear that, as applied to the CRAs' accuracy and reinvestigation obligations, it was intended to ensure that *injured* consumers could recover from CRAs:

> When [consumer report] information is wrong, lives can be ruined . . . we must

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[23] *See, State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003).

[24] 15 U.S.C. § 1681e(b).

[25] 15 U.S.C. § 1681i(a).

> strengthen consumers' ability to correct false reports as quickly as possible. And when such errors are inflicted *willfully or by negligence*, credit bureaus must know that they will be liable.[26]

Because CRAs produce 1.5 billion consumer reports each year, it is not surprising that they are sued hundreds of times each year by consumers alleging violations of § 1681e(b) or § 1681i(a), or both.[27] Although such lawsuits arise from less than .0001% of the consumer reports furnished each year, the costs of defense nonetheless represent significant expenses for the CRAs that must be passed along to their users and ultimately borne by the consumers themselves in the form of higher costs for the users' goods and services.

Whether recovery for a violation of sections 1681e(b) or 1681i(a) is sought under the FCRA's

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[26] 140 Cong. Rec. H9797 (Sep. 27, 1994) (statement of Mr. Schumer) (emphasis added).

[27] Given the volume of information CRAs receive, process, organize and furnish to fulfill their "vital role," when Congress amended the FCRA in 1996, in part, to add damages of $100 to $1,000 as an alternative recovery for consumers, it understood that "perfect" consumer report information is not possible:

> The [Senate Banking] Committee is aware that the consumer reporting system handles almost two billion pieces of data per month and will never be perfectly accurate. Mistakes will occur, and not all of them can be prevented.

S. Rep. No. 104-185 (1995) (amending the FCRA).

willful violation or negligent violation provisions, consumers must sustain an injury caused by the violation to recover under the FCRA's civil liability provisions.[28] For a willful violation, the consumer may elect to recover either her "actual damages" or damages of between $100 and $1,000.[29]

The availability of statutory damages allows the plaintiff to recover without proof of the *amount* of her damages, but does not eliminate the requirement to prove that some injury occurred and was caused by consumer report inaccuracies that were caused by CRAs' alleged unreasonable procedures.

When consumers either fail to allege injury, or fail to produce evidence of injury at the summary judgment stage, CRAs often obtain the consumer's voluntary dismissal of the complaint or summary judgment from the courts. In any particular year, a CRA can dispose of as many as one-third of its cases in this way.[30] Absent some injury, the FCRA permits

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[28] 15 U.S.C. §§ 1681n(a)(1)(A), 1681o(a)(1).

[29] 15 U.S.C. § 1681n(a)(1)(A).

[30] *See, e.g., Jackson v. Equifax Information Services, LLC*, 167 Fed. Appx. 144, 146 (11th Cir. 2006) (summary judgment granted to CRA when plaintiff, who alleged both negligent and willful violations of § 1681e(b) and § 1681i(a) "failed to produce any evidence indicating that he was damaged as a result of an allegedly inaccurate Equifax report."); *Davis v. Equifax Information Services, LLC*, 346 F.Supp.2d 1164, 1171 (N.D. Ala. 2004) (plaintiff alleging negligent and willful violation of § 1681e(b) "must show that (1) inaccurate information was included in her credit report, (2) the inaccuracy was due to Equifax's failure to

(Continued on following page)

no consumer recovery against CRAs for the alleged willful violation of sections 1681e(b) or 1681i(a):

> An agency can escape liability if it establishes that an inaccurate report was generated following reasonable procedures, *which is generally a jury question*. [citations omitted] A consumer asserting claims under §§ 1681i(a) or 1681e(b) against a credit reporting agency bears the burden of proving that the agency's credit report was a causal factor in the denial of his credit application.[31]

Because the "reasonableness" of the CRA's procedures will generally be a jury question, if – as the court of appeals believes – the injury is simply the existence of a consumer report created by procedures that are alleged to be unreasonable, summary judgment for the CRAs becomes nearly impossible. Conversely, if the court of appeals' decision is reversed, and injury remains a separate element of any claim under § 1681e(b) or § 1681i(a), CRAs may continue to obtain summary judgment against uninjured plaintiffs who present no evidence of injury, and the

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follow reasonable procedures to assure maximum possible accuracy of her credit file, and (3) *she suffered injury which was caused by the inclusion of the inaccuracy entry*.") (emphasis added).

[31] *See, e.g., Jackson v. Equifax Information Services, Inc.*, 167 Fed. Appx. 144, 146 (11th Cir. 2006) (emphasis added) (summary judgment affirmed for CRA on claims that it willfully and negligently violated § 1681e(b) and § 1681i(a)).

dismissal of consumer claims that do not even allege injury.

The court of appeals' decision jeopardizes an important CRA defense. Under its decision, a CRA may be held civilly liable for up to $1,000 to an individual plaintiff, and for perhaps billions of dollars for a class of plaintiffs – none of whom are injured by the CRAs' alleged failure to follow reasonable accuracy and reinvestigation procedures.

The court of appeals' decision fundamentally alters the FCRA's careful balancing of CRA and consumer interests and ignores the procedural consequences of its decision. As a result, CRAs may be deprived of a defense to hundreds of claims brought each year by uninjured plaintiffs who may avoid summary judgment or dismissal of their claims under § 1681e(b) or 1681i(a) because they are no longer required to even allege that the CRAs' unreasonable accuracy and reinvestigation procedures caused their injuries, but only that the procedures resulted in a report about the consumers.

CONCLUSION

For the reasons set forth above, TeleCheck's petition for writ of certiorari should be granted.

Respectfully submitted,

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